

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. 2:14-CV-00218-VEB

JENNIFER LEE DULMAINE,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

**I. INTRODUCTION**

In January of 2011, Plaintiff Jennifer Lee Dulmaine applied for Disability Insurance Benefits (“DIB”) under the Social Security Act. The Commissioner of Social Security denied the application.

1 Plaintiff, represented by Randy J. Fair, Esq., Calbom & Schwab, P.C.  
2 commenced this action seeking judicial review of the Commissioner's denial of  
3 benefits pursuant to 42 U.S.C. §§ 405 (g) and 1383 (c)(3). The parties consented to  
4 the jurisdiction of a United States Magistrate Judge. (Docket No. 6).

5 On March 30, 2015, the Honorable Rosanna Malouf Peterson, Chief United  
6 States District Judge, referred this case to the undersigned pursuant to 28 U.S.C. §  
7 636(b)(1)(A) and (B). (Docket No. 18).

## 8 **II. BACKGROUND**

9 The procedural history may be summarized as follows:

10 Plaintiff applied for DIB on January 27, 2011, alleging disability beginning  
11 November 8, 2010. (T at 222).<sup>1</sup> The application was denied initially and on  
12 reconsideration. Plaintiff requested a hearing before an Administrative Law Judge  
13 ("ALJ"). On July 10, 2012, a hearing was held before ALJ R.J. Payne. (T at 36).  
14 Plaintiff appeared with an attorney and testified. (T at 44-47). The ALJ also received  
15 testimony from two medical experts, Dr. Alexander White (T at 39-42) and Dr.  
16 Margaret E. Moore. (T at 42-44, 48-59). A supplemental hearing was held on January  
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19 <sup>1</sup> Citations to ("T") refer to the administrative record at Docket No. 11.

1 11, 2013. Plaintiff again appeared with her attorney and testified. (T at 68-89). The  
2 ALJ also received testimony from Jinnie Lawson, a vocational expert. (T at 90-97).

3 On February 14, 2013, the ALJ issued a written decision denying the  
4 application for DIB. (T at 12-35). The ALJ's decision became the Commissioner's  
5 final decision on May 1, 2014, when the Appeals Council denied Plaintiff's request  
6 for review. (T at 1-6).

7 On June 30, 2014, Plaintiff, acting by and through her counsel, timely  
8 commenced this action by filing a Complaint in the United States District Court for  
9 the Eastern District of Washington. (Docket No. 3). The Commissioner interposed an  
10 Answer on October 6, 2014. (Docket No. 10).

11 Plaintiff filed a motion for summary judgment on January 27, 2015. (Docket  
12 No. 14). The Commissioner moved for summary judgment on March 13, 2015.  
13 (Docket No. 16). Plaintiff filed a reply brief on March 30, 2015. (Docket No. 17).

14 For the reasons set forth below, the Commissioner's motion is granted,  
15 Plaintiff's motion is denied, and this case is closed.

### III. DISCUSSION

#### A. Sequential Evaluation Process

The Social Security Act (“the Act”) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff’s age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components.

*Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001). The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii). If plaintiff does not  
2 have a severe impairment or combination of impairments, the disability claim is  
3 denied. If the impairment is severe, the evaluation proceeds to the third step, which  
4 compares plaintiff's impairment with a number of listed impairments acknowledged  
5 by the Commissioner to be so severe as to preclude substantial gainful activity. 20  
6 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If  
7 the impairment meets or equals one of the listed impairments, plaintiff is conclusively  
8 presumed to be disabled. If the impairment is not one conclusively presumed to be  
9 disabling, the evaluation proceeds to the fourth step, which determines whether the  
10 impairment prevents plaintiff from performing work which was performed in the past.  
11 If a plaintiff is able to perform previous work he or she is deemed not disabled. 20  
12 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual  
13 functional capacity (RFC) is considered. If plaintiff cannot perform past relevant  
14 work, the fifth and final step in the process determines whether plaintiff is able to  
15 perform other work in the national economy in view of plaintiff's residual functional  
16 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
17 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish a *prima facie* case of  
2 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
3 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met  
4 once plaintiff establishes that a mental or physical impairment prevents the  
5 performance of previous work. The burden then shifts, at step five, to the  
6 Commissioner to show that (1) plaintiff can perform other substantial gainful activity  
7 and (2) a “significant number of jobs exist in the national economy” that plaintiff can  
8 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

9 **B. Standard of Review**

10 Congress has provided a limited scope of judicial review of a Commissioner’s  
11 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision, made  
12 through an ALJ, when the determination is not based on legal error and is supported  
13 by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985);  
14 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). “The [Commissioner’s]  
15 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
16 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
17 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,  
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
19 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).

1 Substantial evidence “means such evidence as a reasonable mind might accept as  
2 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
3 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]  
4 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*, 348  
5 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a whole,  
6 not just the evidence supporting the decision of the Commissioner. *Weetman v.*  
7 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
8 526 (9<sup>th</sup> Cir. 1980)).

9 It is the role of the Commissioner, not this Court, to resolve conflicts in  
10 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
11 interpretation, the Court may not substitute its judgment for that of the Commissioner.  
12 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
13 Nevertheless, a decision supported by substantial evidence will still be set aside if the  
14 proper legal standards were not applied in weighing the evidence and making the  
15 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup>  
16 Cir. 1987). Thus, if there is substantial evidence to support the administrative findings,  
17 or if there is conflicting evidence that will support a finding of either disability or  
18 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812  
19 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

1 **C. Commissioner's Decision**

2 The ALJ determined that Plaintiff had not engaged in substantial gainful  
3 activity since November 8, 2010 (the alleged onset date) and met the insured status  
4 requirements of the Social Security Act through December 31, 2015 (the date last  
5 insured). (T at 17). The ALJ found that Plaintiff's morbid obesity, polycystic ovary,  
6 diabetes mellitus (type 2), headaches (mixed), asthma, pain disorder, and chronic  
7 posttraumatic stress disorder were "severe" impairments under the Act. (Tr. 17).

8 However, the ALJ concluded that Plaintiff did not have an impairment or  
9 combination of impairments that met or medically equaled one of the impairments set  
10 forth in the Listings. (T at 18).

11 The ALJ determined that Plaintiff retained the residual functional capacity  
12 ("RFC") to perform light work as defined in 20 CFR § 404.1567 (b), with the  
13 following limitations: lifting and carrying 20 pounds occasionally and 10 pounds  
14 frequently; stand/walk/sit 6 hours in an 8-hour workday; unlimited pushing and  
15 pulling within lifting restrictions; avoid climbing ladders, ropes, scaffolds, crawling,  
16 and concentrated exposure to extreme cold/heat, fumes, odors/dusts/gases, poor  
17 ventilation; avoid moderate exposure to hazards such as machinery and heights; mild  
18 to moderate limitation with regard to maintaining attention and concentration for  
19 extended periods; moderate limitation as to working in coordination with or proximity



1 to others without being distracted by them; and moderate limitation with regard to  
2 interacting appropriately with the general public and in responding appropriately to  
3 changes in the work setting. (T at 19).

4 The ALJ concluded that Plaintiff could not perform her past relevant work as a  
5 social service case worker or intensive in-home support worker. (T at 29). However,  
6 considering Plaintiff's age (39 on the alleged onset date), education (at least high  
7 school), work experience, and residual functional capacity (light work, with  
8 limitations described above), the ALJ determined that, as of September 2, 2012, there  
9 were jobs that exist in significant numbers that Plaintiff could perform. (T at 29-30).

10 Accordingly, the ALJ determined that Plaintiff was not disabled within the  
11 meaning of the Social Security Act between November 8, 2010 (the alleged onset  
12 date) and February 14, 2013 (the date of the decision) and was therefore not entitled  
13 to DIB. (T at 31).

14 **D. Plaintiff's Arguments**

15 Plaintiff contends that the Commissioner's decision should be reversed. She  
16 offers four (4) main arguments. First, she contends that the ALJ did not properly  
17 assess the medical opinion evidence. Second, Plaintiff challenges the ALJ's  
18 credibility determination. Third, she asserts that the ALJ improperly rejected lay  
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1 witness evidence. Fourth, Plaintiff argues that the ALJ's step five analysis was  
2 flawed. This Court will address each argument in turn.

#### 3 IV. ANALYSIS

##### 4 A. Medical Opinion Evidence

5 In disability proceedings, a treating physician's opinion carries more weight  
6 than an examining physician's opinion, and an examining physician's opinion is given  
7 more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d  
8 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the  
9 treating or examining physician's opinions are not contradicted, they can be rejected  
10 only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
11 opinion can only be rejected for "specific" and "legitimate" reasons that are supported  
12 by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th  
13 Cir. 1995).

14 An ALJ satisfies the "substantial evidence" requirement by "setting out a  
15 detailed and thorough summary of the facts and conflicting clinical evidence, stating  
16 his interpretation thereof, and making findings." *Garrison v. Colvin*, 759 F.3d 995,  
17 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).  
18 "The ALJ must do more than state conclusions. He must set forth his own  
19 interpretations and explain why they, rather than the doctors', are correct." *Id.*

1 Plaintiff argues that the ALJ erred in weighing the medical opinions offered by  
2 a consultative examiner, treating nurse practitioner, and State Agency review  
3 consultants. This Court will summarize these opinions, as well as the opinion offered  
4 by Dr. Moore, a medical expert who testified at the first administrative hearing, and  
5 then explain its consideration of the ALJ's evaluation of those opinions.

6 **1. Dr. Zimmeroff**

7 In March of 2011, Dr. Jennifer Zimmeroff, a consultative examiner, performed  
8 a psychological diagnostic evaluation. Dr. Zimmeroff reported that Plaintiff  
9 "exhibited obvious evidence of psychomotor agitation in the form of extreme and  
10 constant leg and/or arm shaking, and stuttering" as she became more anxious during  
11 the exam. (T at 341). Dr. Zimmeroff found "no overt signs of malingering or factitious  
12 behavior." (T at 341).

13 She opined that Plaintiff appeared "to be impaired by her serious anxiety and  
14 panic attacks" and reported that Plaintiff would only be able to perform employment  
15 tasks while isolated, without social interaction, in a controlled environment, "with  
16 limited impinging stress." (T at 344-45). Dr. Zimmeroff assigned a Global Assessment  
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1 of Functioning (“GAF”) score<sup>2</sup> of 45 (T at 345), which is indicative of serious  
2 impairment in social, occupational or school functioning. *Onorato v. Astrue*, No. CV-  
3 11-0197, 2012 U.S. Dist. LEXIS 174777, at \*11 n.3 (E.D.Wa. Dec. 7, 2012).

4 Dr. Zimmeroff concluded that Plaintiff was functioning so poorly that it was  
5 unlikely that she could continue to work, even on a part-time basis, and found it  
6 “doubtful” that Plaintiff was “stable enough to complete the requirements of a  
7 working environment.” (T at 346).

8 The ALJ gave little weight to Dr. Zimmeroff’s opinion, finding it based heavily  
9 on Plaintiff’s subjective reports and contradicted by the overall medical record. (T at  
10 28).

## 11 **2. Mr. Hanley**

12 Plaintiff had an extended treating relationship with Wenatchee Valley Clinical  
13 Behavioral Health, where she was seen primarily by Michael Hanley, a psychiatric  
14 advanced registered nurse practitioner (“ARNP”). On December 28, 2011, Mr.  
15 Hanley prepared a letter summarizing Plaintiff’s care over the prior 5 years. He  
16 explained that Plaintiff had “made considerable progress but still struggles with  
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18 <sup>2</sup> “A GAF score is a rough estimate of an individual's psychological, social, and occupational  
19 functioning used to reflect the individual's need for treatment.” *Vargas v. Lambert*, 159 F.3d 1161,  
20 1164 n.2 (9th Cir. 1998).

1 chronic mood issues.” (T at 395). He diagnosed PTSD, obsessive compulsive  
2 disorder, major depressive disorder, ADHD, and panic with agoraphobia. (T at 395).  
3 He opined that Plaintiff was disabled by these disorders because of difficulty leaving  
4 her home and the likelihood that she would experience “[s]evere pain and anxiety” if  
5 she was forced to be away from her home, which Mr. Hanley described as Plaintiff’s  
6 “security zone.” (T at 395). Mr. Hanley also opined that Plaintiff’s impairments met  
7 Listings § 12.06 (A), (B), and (C). (T at 396).

8 In evaluating a claim, the ALJ must consider evidence from the claimant’s  
9 medical sources. 20 C.F.R. §§ 404.1512, 416.912. Medical sources are divided into  
10 two categories: “acceptable” and “not acceptable.” 20 C.F.R. § 404.1502. Acceptable  
11 medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1502.  
12 Medical sources classified as “not acceptable” (also known as “other sources”) include  
13 nurse practitioners, therapists, licensed clinical social workers, and chiropractors. SSR  
14 06-03p.

15 The opinion of an acceptable medical source is given more weight than an  
16 “other source” opinion. 20 C.F.R. §§ 404.1527, 416.927. For example, evidence from  
17 “other sources” is not sufficient to establish a medically determinable impairment.  
18 SSR 06-03p. However, “other source” opinions must be evaluated on the basis of  
19 their qualifications, whether their opinions are consistent with the record evidence, the  
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1 evidence provided in support of their opinions and whether the other source is “has a  
2 specialty or area of expertise related to the individual's impairment.” *See* SSR 06-03p,  
3 20 CFR §§404.1513 (d), 416.913 (d). The ALJ must give “germane reasons” before  
4 discounting an “other source” opinion. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.  
5 1993).

6 The ALJ gave little weight to Mr. Haley’s opinion, finding it not well-supported  
7 by clinical or laboratory findings and inconsistent with his narrative reports and the  
8 overall medical record. (T at 28).

### 9 **3. State Agency Review Consultants**

10 In March of 2011, Dr. Edward Beaty, a non-examining State Agency Review  
11 consultant, opined that Plaintiff was moderately limited with respect to her ability to  
12 maintain attention and concentration for extended periods; perform activities within a  
13 schedule, maintain regular attendance, and be punctual within customary tolerances;  
14 work in coordination with or in proximity to others without being distracted by them;  
15 and complete a normal workday and workweek without interruptions from  
16 psychologically based symptoms and perform at a consistent pace without an  
17 unreasonable number and length of rest periods. (T at 111). Dr. Beaty assessed a  
18 marked limitation as to Plaintiff’s ability to interact appropriately with the general  
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1 public. (T at 112). In May of 2011, Dr. Patricia Kraft, another non-examining State  
2 Agency review consultant, made the same findings. (T at 126-27).

3 The ALJ did not discuss either of these assessments.

#### 4 5 **4. Dr. Moore**

6 Dr. Margaret Moore testified at the administrative hearing as a medical expert.  
7 Dr. Moore questioned the treatment provided to Plaintiff by Mr. Haley, opining that  
8 the record indicated “really not good medication management.” (T at 49). Dr. Moore  
9 noted evidence that side effects from psychotropic medications were exacerbating  
10 Plaintiff’s mental health issues, including, in particular, anxiety. (T at 49). Dr. Moore  
11 also found several of Mr. Haley’s diagnoses “not well supported,” including ADHD,  
12 PTSD, obsessive-compulsive disorder, and major depressive disorder. (T at 49-52).

13 With regard to anxiety, Dr. Moore noted that Plaintiff complained of anxiety  
14 symptoms periodically for many years, including while she was working. (T at 50-  
15 51). This led Dr. Moore to conclude that Plaintiff’s anxiety was “basically treatable,”  
16 although it had, in her view, not been effectively treated by Mr. Haley’s medication  
17 management. (T at 50-51).

18 Overall, Dr. Moore opined that, from a mental health perspective, the record  
19 supported “some significant issues that would pose functional limitations in a  
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1 workplace,” but she did not believe that Plaintiff’s mental health impairments met or  
2 equaled one of the Listings. (T at 53). With respect to activities of daily living, Dr.  
3 Moore assessed mild limitations, with a moderate limitation as to driving. (T at 54).  
4 She found moderate limitation as to social functioning and mild limitation with respect  
5 to concentration, persistence, and pace. (T at 54).

6 The ALJ afforded significant weight to Dr. Moore’s opinion, noting her  
7 opportunity to review the longitudinal record and her expertise, both with regard to  
8 the Social Security program and in the mental health field. (T at 28).

## 9 **5. Analysis**

10 Fundamentally, Plaintiff’s challenge is to the fact that the ALJ accepted the  
11 assessment of Dr. Moore, who did not examine or treat Plaintiff, rather than the  
12 opinions offered by Dr. Zimmeroff (who examined Plaintiff once) and Mr. Haley (who  
13 treated Plaintiff extensively). For the following reasons, this Court finds that the  
14 ALJ’s decision is supported by substantial evidence and consistent with applicable  
15 law.

16 Dr. Zimmeroff acknowledged that the only record she reviewed was an undated  
17 disability report completed by Plaintiff. (T at 339). Her assessment of Plaintiff’s  
18 work-related limitations appears based primarily on Plaintiff’s self-reports. In fact,  
19 Dr. Zimmeroff’s actual clinical examination of Plaintiff noted some difficulties, but



1 overall showed a claimant who was “very pleasant and cooperative,” with “normal”  
2 speech, “good” memory and concentration, and “good” abstract thinking abilities and  
3 judgment. (T at 341-43). Thus, it was reasonable for the ALJ to conclude that the  
4 extreme limitations assessed by Dr. Zimmeroff were based primarily on Plaintiff’s  
5 self-reports. As discussed below, the ALJ reasonably discounted the credibility of  
6 Plaintiff’s complaints. An ALJ may discount a physician’s opinion predicated on  
7 subjective complaints found to be less than credible. *Bray v. Comm’r of Soc. Sec.*, 554  
8 F.3d 1219, 1228 (9<sup>th</sup> Cir. 2009). Moreover, as outlined below, the ALJ acted within  
9 his discretion in giving more weight to the opinion of Dr. Moore, who testified at the  
10 hearing and was subject to cross-examination, and who (unlike Dr. Zimmeroff)  
11 reviewed the entire medical record before rendering her assessments.

12 With regard to Mr. Haley, the ALJ was required only to provide “germane”  
13 reasons for discounting the opinions of a nurse practitioner. *Dodrill v. Shalala*, 12  
14 F.3d 915, 919 (9<sup>th</sup> Cir. 1993). The ALJ provided such reasons. For example, the ALJ  
15 cited treatment notes contradicting Mr. Haley’s assessment. In general, Mr. Haley’s  
16 treatment notes describe side effects of medications he prescribed, but generally  
17 indicated improved functioning and relatively stable symptoms when properly  
18 managed. (T at 28, 374-75, 411-12, 520, 524, 526). In November of 2010, Mr. Haley  
19 noted that Plaintiff would have variable frequency and duration of symptomatic

1 episodes, but should be able to work unless her mood/panic disorder became  
2 uncontrollable. (T at 316-17). The ALJ reasonably cited this inconsistency as a basis  
3 for discounting Mr. Haley's opinion. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216  
4 (9<sup>th</sup> Cir. 2005)(finding that "discrepancy" between treatment notes and opinion was  
5 appropriate basis for discounting opinion regarding the claimant's limitations).

6 In addition, Dr. Moore disagreed with several of the diagnoses offered by Mr.  
7 Haley and was critical of the nurse practitioner's medication management. (T at 25,  
8 49-52). In particular, Dr. Moore opined that many of Plaintiff's symptoms were likely  
9 side effects of medications that Mr. Haley did not effectively manage. The ALJ  
10 reasonably afforded greater weight to the opinion Dr. Moore, a medical expert who  
11 reviewed the entire record, testified at the hearing, and was subject to cross-  
12 examination by Plaintiff's counsel. *See Andrews v. Shalala*, 53 F.3d 1035, 1042 (9<sup>th</sup>  
13 Cir. 1995)("[A]n ALJ may give greater weight to the opinion of a non-examining  
14 expert who testifies at a hearing subject to cross-examination.")(citing *Torres v.*  
15 *Secretary of H.H.S.*, 870 F.2d 742, 744 (1st Cir. 1989)); *see also Moody v. Astrue*, No  
16 CV-10-161, 2011 U.S. Dist. LEXIS 125165, at \*22-23 (E.D. Wash. Oct. 28,  
17 2011)(finding that ALJ did not err in giving greater weight to medical expert's opinion  
18 over treating psychiatrist's opinion concerning substance abuse).

1 Plaintiff correctly notes that the ALJ erred by failing to discuss the assessments  
2 of the non-examining State Agency review consultants. However, under the particular  
3 circumstances present here, that error was harmless. In the narrative portion of their  
4 assessments, Drs. Beaty and Kraft concluded that Plaintiff (1) was capable of non-  
5 complex, repetitive tasks at a moderate pace, (2) could sustain work-related social  
6 interaction with co-workers and supervisors, with limited to no interaction with the  
7 public, and (3) could tolerate simple variations in work-related routines and carry-out  
8 work-related goals and plans. (T at 111-12, 126-27). These narrative findings, which  
9 are the critical components of the State Agency consultants' opinions,<sup>3</sup> are consistent  
10 with the ALJ's RFC determination, which found Plaintiff mild to moderately  
11 limitation with regard to maintaining attention and concentration for extended periods,  
12 moderately limited as to working in coordination with or proximity to others and  
13 interacting with the general public and responding appropriately to changes in the  
14 work setting. (T at 19).

15 An ALJ's error may be deemed harmless if, in light of the other reasons  
16 supporting the overall finding, it can be concluded that the error did not "affect[ ] the

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18 <sup>3</sup> The Program Operations Manual System (POMS), an internal Social Security Administration  
19 document, provides, in pertinent part, that "[i]t is the narrative written by the psychiatrist or  
20 psychologist in section III . . . that adjudicators are to use as the assessment of RFC." "The POMS  
does not have the force of law, but it is persuasive authority." *Warre v. Comm'r of Soc. Sec. Admin.*,  
439 F.3d 1001, 1005 (9th Cir. 2006)).

1 ALJ's conclusion.” *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th  
2 Cir. 2004); *see also Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054-55 (9th  
3 Cir. 2006) (describing the harmless error test as whether “the ALJ's error did not  
4 materially impact his decision”); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th  
5 Cir.2006) (holding that an error is harmless if it was “inconsequential to the ultimate  
6 nondisability determination”). For the reasons outlined above, the ALJ’s error in  
7 failing to discuss the State Agency opinions was harmless. Indeed, the RFC  
8 determination and State Agency opinions are generally consistent with each other.

9 In sum, Plaintiff argues that the ALJ should have weighed the evidence  
10 differently and resolved the conflict in favor of the opinions provided by Dr.  
11 Zimmeroff and Mr. Haley. However, it is the role of the Commissioner, not this Court,  
12 to resolve conflicts in evidence. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
13 1989); *Richardson*, 402 U.S. at 400. If the evidence supports more than one rational  
14 interpretation, this Court may not substitute its judgment for that of the Commissioner.  
15 *Allen v. Heckler*, 749 F.2d 577, 579 (9th 1984). If there is substantial evidence to  
16 support the administrative findings, or if there is conflicting evidence that will support  
17 a finding of either disability or nondisability, the Commissioner’s finding is  
18 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987). Here, for the  
19 reasons outlined above, the ALJ’s decision was supported by substantial evidence and  
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1 must therefore be sustained. *See Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.  
2 1999)(holding that if evidence reasonably supports the Commissioner’s decision, the  
3 reviewing court must uphold the decision and may not substitute its own judgment).

#### 4 **B. Credibility**

5 A claimant’s subjective complaints concerning his or her limitations are an  
6 important part of a disability claim. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d  
7 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ’s findings with regard to the  
8 claimant’s credibility must be supported by specific cogent reasons. *Rashad v.*  
9 *Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent affirmative evidence of  
10 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear  
11 and convincing.” *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). “General findings  
12 are insufficient: rather the ALJ must identify what testimony is not credible and what  
13 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v.*  
14 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

15 However, subjective symptomatology by itself cannot be the basis for a finding  
16 of disability. A claimant must present medical evidence or findings that the existence  
17 of an underlying condition could reasonably be expected to produce the  
18 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.  
19 § 404.1529(b), 416.929; SSR 96-7p.

1 Here, Plaintiff testified as follows: Her problems with OCD started in college.  
2 She has had PTSD issues since the age of 19, when she was raped. Anxiety and panic  
3 attacks were problematic even while she was working. (T at 69). Her employer  
4 attempted to provide workplace accommodations, but it eventually became untenable.  
5 (T at 72-73). During a panic attack, she curls up, feels like she is having a heart attack,  
6 and is unable to talk. (T at 75). She has lived with her domestic partner for 20 years.  
7 (T at 75). She does her shopping late at night to avoid crowds. (T at 75). She avoids  
8 driving. (T at 76). Other than doctor's appointments and late night shopping, Plaintiff  
9 generally does not leave her home. (T at 78). She needs assistance and encouragement  
10 to perform basic activities such as showering. (T at 80). She cannot cook. (T at 80).  
11 She has difficulty relating to other people, particularly when the other person is  
12 critical. (T at 81-82). Plaintiff listed dealing with the public as the "No. 1 reason" she  
13 is not able to work. (T at 86). She has difficulty sleeping. (T at 87). She does not  
14 watch TV or use the computer, but reads science fiction books at night. (T at 88).

15 The ALJ concluded that Plaintiff's medically determinable impairments could  
16 reasonably be expected to cause the alleged symptoms, but that her statements  
17 regarding the intensity, persistence, and limited effects of those symptoms were not  
18 entirely credible. (T at 26).

1 The ALJ's decision was supported by substantial evidence. Although lack of  
2 supporting medical evidence cannot form the sole basis for discounting pain  
3 testimony, it is a factor the ALJ may consider when analyzing credibility. *Burch v.*  
4 *Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005). Subjective complaints contradicted by  
5 medical records and by daily activities are properly considered. *Carmickle v. Comm'r*  
6 *of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9<sup>th</sup> Cir. 2008); *Thomas v. Barnhart*, 278  
7 F.3d 947, 958-59 (9<sup>th</sup> Cir. 2002). Here, the ALJ afforded significant weight to the  
8 expert opinion of Dr. Moore, who reviewed the record and concluded that Plaintiff's  
9 mental health impairments were less severe than alleged. (T at 26, 28). The ALJ also  
10 cited and extensively discussed the treatment history, finding it inconsistent with the  
11 claims of disabling impairments. (T at 20-27).

12 The ALJ also noted inconsistencies in Plaintiff's reported daily activities.  
13 Although she testified as to an inability to cook at the hearing (T at 80), in a function  
14 report she indicated that she prepared meals from scratch on a regular basis. (T at 253).  
15 While she testified as to difficulties with showering (T at 80), her function report  
16 indicated no difficulty with personal care. (T at 252). When assessing a claimant's  
17 credibility, the ALJ may employ "ordinary techniques of credibility evaluation."  
18 *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 n.3 (9<sup>th</sup> Cir. 2010)(quoting  
19 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9<sup>th</sup> Cir. 1996)). Activities of daily living are a

1 relevant consideration in assessing a claimant's credibility. *See Rollins v. Massanari*,  
2 261 F.3d 853, 857 (9<sup>th</sup> Cir. 2001). Although the claimant does not need to "vegetate  
3 in a dark room" to be considered disabled, *Cooper v. Brown*, 815 F.2d 557, 561 (9<sup>th</sup>  
4 Cir. 1987), the ALJ may discount a claimant's testimony to the extent his or her  
5 activities of daily living "contradict claims of a totally debilitating impairment."  
6 *Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9<sup>th</sup> Cir. 2011).

7 Plaintiff offers alternative arguments and interpretations of the evidence.  
8 However, where, as here, substantial evidence supports the ALJ's credibility  
9 determination, this Court may not overrule the Commissioner's interpretation even if  
10 "the evidence is susceptible to more than one rational interpretation." *Magallanes*, 881  
11 F.2d 747, 750 (9<sup>th</sup> Cir. 1989); *see also Morgan v. Commissioner*, 169 F.3d 595, 599  
12 (9<sup>th</sup> Cir. 1999)("[Q]uestions of credibility and resolutions of conflicts in the testimony  
13 are functions solely of the [Commissioner].").

#### 14 **C. Lay Witness Evidence**

15 In February of 2011, Jean Lehman, Plaintiff's domestic partner, completed a  
16 third party function report. She reported that Plaintiff's panic attacks were "very  
17 disabling" and caused her to "shake, stutter, [and] rock back and forth." (T at 259).  
18 She described the attacks as unpredictable and lasting several hours. (T at 260). Ms.  
19  
20



1 Lehman indicated that Plaintiff was unable to go out alone, had difficulty with stress,  
2 and was often unable to complete tasks. (T at 261, 262, 265).

3 “Testimony by a lay witness provides an important source of information about  
4 a claimant’s impairments, and an ALJ can reject it only by giving specific reasons  
5 germane to each witness.” *Regennitter v. Comm’r*, 166 F.3d 1294, 1298 (9<sup>th</sup> Cir.  
6 1999).

7 Here, the ALJ discussed Ms. Lehman’s report in detail, but discounted it. The  
8 ALJ noted that the report essentially reflected the same allegations made by Plaintiff.  
9 (T at 29). The ALJ found Ms. Lehman’s report not fully credible for the same reasons  
10 he found Plaintiff’s allegations not fully credible. For the reasons outlined above (i.e.  
11 Dr. Moore’s assessment, treating history, and the inconsistency regarding Plaintiff’s  
12 activities of daily living), this Court finds that the ALJ provided “germane” reasons  
13 for discounting Ms. Lehman’s lay evidence.

#### 14 **D. Step Five Analysis**

15 At step five of the sequential evaluation, the burden is on the Commissioner to  
16 show that (1) the claimant can perform other substantial gainful activity and (2) a  
17 “significant number of jobs exist in the national economy” which the claimant can  
18 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). If a claimant cannot  
19 return to his previous job, the Commissioner must identify specific jobs existing in

1 substantial numbers in the national economy that the claimant can perform. See  
2 *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.1995). The Commissioner may carry  
3 this burden by “eliciting the testimony of a vocational expert in response to a  
4 hypothetical that sets out all the limitations and restrictions of the claimant.” *Andrews*  
5 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995). The ALJ's depiction of the claimant's  
6 disability must be accurate, detailed, and supported by the medical record. *Gamer v.*  
7 *Secretary of Health and Human Servs.*, 815 F.2d 1275, 1279 (9th Cir.1987). “If the  
8 assumptions in the hypothetical are not supported by the record, the opinion of the  
9 vocational expert that claimant has a residual working capacity has no evidentiary  
10 value.” *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9<sup>th</sup> Cir. 1984).

11 Here, the ALJ concluded that there were jobs that exist in significant numbers  
12 in the national economy that Plaintiff can perform. (T at 30-31). In particular, relying  
13 on the testimony of a vocational expert, the ALJ concluded that Plaintiff retained the  
14 RFC to work as a parking lot attendant, pricer/marker, dispatcher, document preparer,  
15 and escort vehicle driver. (T at 30). Plaintiff argues that the ALJ's step five analysis  
16 was flawed. However, Plaintiff essentially re-states her earlier arguments and  
17 contends that the ALJ's errors likewise undermines the step five findings. This Court  
18 finds those arguments unpersuasive for the reasons outlined above and likewise rejects  
19 Plaintiff's challenge to the step five analysis. See *Hall v. Colvin*, No. CV-13-0043,

1 2014 U.S. Dist. LEXIS 45006, at \*24-25 (E.D. Wash. Mar. 31, 2014)(“A claimant  
2 fails to establish that a Step 5 determination is flawed by simply restating arguments  
3 that the ALJ improperly discounted certain evidence, when the record demonstrates  
4 the evidence was properly rejected.”)(citing *Stubbs-Danielson v. Astrue*, 539 F.3d  
5 1169, 1175-76 (9<sup>th</sup> Cir. 2008).

#### 6 **IV. CONCLUSION**

7 After carefully reviewing the administrative record, this Court finds substantial  
8 evidence supports the Commissioner’s decision, including the objective medical  
9 evidence and supported medical opinions. It is clear that the ALJ thoroughly examined  
10 the record, afforded appropriate weight to the medical evidence, including the  
11 assessments of the treating and examining medical providers and medical experts, and  
12 afforded the subjective claims of symptoms and limitations an appropriate weight  
13 when rendering a decision that Plaintiff is not disabled. This Court finds no reversible  
14 error and because substantial evidence supports the Commissioner’s decision, the  
15 Commissioner is GRANTED summary judgment and that Plaintiff’s motion for  
16 judgment summary judgment is DENIED.

**V. ORDERS**

IT IS THEREFORE ORDERED that:

Plaintiff's motion for summary judgment, Docket No. 14, is DENIED.

The Commissioner's motion for summary judgment, Docket No. 16, is GRANTED.

The District Court Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of the Commissioner, and close this case.

DATED this 21<sup>st</sup> day of December, 2015.

/s/Victor E. Bianchini  
VICTOR E. BIANCHINI  
UNITED STATES MAGISTRATE JUDGE